

Short Circuit | Episode 150

Vacation rentals, COVID orders, and Electoral College studies

ANTHONY: Hello, I'm Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. And welcome to *Short Circuit*, your podcast on the Federal Courts of Appeals. Plus, sometimes other courts of appeals those among the staff, several States this week, we'll be discussing some recent opinions from the state, sorry, the Commonwealth of Pennsylvania. Why the Keystone state? Because next week on Friday, October 16th, the Center for Judicial Engagement is hosting an online forum on judicial engagement and the Pennsylvania Constitution. If you're interested, please click on the link that we'll include in the feed for this podcast or simply go to ij.org/event. Singular E V E N T. And then click on the link for the forum at the bottom of the page.

At the event, there will be a lot to see, including two hours of free time CLE. For those of you who are members of the Pennsylvania bar. You can watch a keynote address by the dean of law blogging Howard Bashman who in his day job is a Pennsylvania appellate lawyer, as many of you know. There also will be two panels. One with Andrew Ward joined by two of the foremost experts on state constitutional law in the country: Bob Williams of Rutgers Law School and Seth Kramer of the University of Pennsylvania. That will be moderated by Darpana Sheth, our old colleague at IJ, who's now Director of Litigation at FIRE, the Foundation for Individual Rights in Education, which is in Philadelphia. Then panel moderated by US District Judge for the Eastern district of Pennsylvania, Joshua Wolson, who is also in Pennsylvania. You'll hear from three all-star, Pennsylvania litigators, Mark Aronchick of Hangley Aronchick, who is currently actively litigating election law cases in Pennsylvania--isn't there some election stuff going on at Pennsylvania right now--John Hare of Marshall Dennehey and has a written a book on the Pennsylvania Supreme Court and David Osborne, who for many years litigated at the Fairness Center in Harrisburg. Unsurprisingly, with all of these experts, we're offering our free CLE. The event is co-sponsored with our friends at the Philadelphia chapter of the Federalist Society. And if you want to sign up through their webpage, you can, you can find it on the main Federalist Society events page.

To get us ready for all things, pencils and judicial engagement, this week, I'm joined bar by our fellow at the Center for Judicial engagement, Adam Shelton and Josh Wyndham, IJ attorney and lead attorney. In *Ladd v. Real Estate Commission*, a big case from the Pennsylvania Supreme court from this past May. We haven't talked about that opinion yet on short circuit, so I thought it was a good chance to catch up with Josh, ask him what it means for the Pennsylvania constitution and state constitutional law more generally. Josh, take it away.

JOSH: Well, I mean, let me start by saying that it's a, it's a very good thing for the Pennsylvania constitution and for state constitutional law. This is a, this is an as-applied challenge to an occupational licensing law in Pennsylvania, which apparently had never happened before in the history of the Pennsylvania Supreme court. We brought a challenge on behalf of a woman named Sally Ladd, who is a vacation property manager in the Pocono Mountains. She actually lives in New Jersey, but what she does is she helps people who own vacation properties in the mountains post and coordinate their short-term rentals on sites like Airbnb, VRBO, that kind of thing. And she was doing this pretty successfully for

a few years for friends and neighbors--I think she had a maximum of like five or six clients at the height of her business. And this to her was a really sort of an ideal source of supplemental income. She's in her sixties, she was thinking about retirement and she thought to herself, this would be great job that I could do, you know, from my kitchen, in my PJ's into my golden years. And so, she was getting really excited about building up this business. That dream sort of came crashing down in early 2017 when she got a call from an investigator in, in Pennsylvania from the, from the state's Bureau of Professional and Occupational Affairs accusing her of the unlicensed practice of real estate.

And Sally was pretty shocked. I mean, her conception of what a real estate broker does is that they buy and sell houses, you know, lease out big commercial properties, worth millions of dollars. She's like, I don't really do this kind of work. Why would I need a broker's license? And so, she started looking into it and it turns out that the Real Estate Licensing and Registration Act in Pennsylvania whose original version was drafted in 1929--so about a hundred years ago--sweeps in anybody who helps to facilitate the rental of property. Now obviously the short-term rental economy, home sharing, Airbnb, none of that could have been conceived by the people who drafted this law in the 1920s, right. And it couldn't have even been conceived by the folks who re-codified it and re-adopted it in the eighties. And yet here we are, you know, in the 21st century with a woman who basically just does all her work online being told you have to get a traditional broker's license. And the requirements of this license were pretty onerous. I mean, you have to spend three years apprenticing for a licensed broker. You have to take hundreds of hours of courses on real estate practice, two exams on real estate practice, and you have to open a separate brick and mortar office in Pennsylvania. You know, she doesn't live there, she doesn't use an office, she works from home. So, all of this to Sally seemed incredibly excessive for the work she was doing and rather than, you know, subjecting herself to all that spending three years in her sixties, learning about work, she would never do, she decided to shut her, her business. And soon after she found us, and we filed a constitutional challenge to the application of this real estate license to her.

ANTHONY [5:59]: And so, the Pennsylvania Supreme Court ruled, but it, it, it kind of address the merits of the case, but it wasn't actually at the merit stage. Could you tell me where the case is at now and then what the court said?

JOSH: Yeah, soon after Sally found us, we filed a declaratory judgment action in the Commonwealth Court's original jurisdiction. The Commonwealth Court is an appellate court in Pennsylvania that can hear constitutional challenges in its original jurisdiction. So that's where we went soon after the government filed a motion to dismiss, what's called a demurrer in Pennsylvania, and that's basically saying, look, you failed to see to constitutional claim and, excuse me, and the Commonwealth Court dismissed. They said, look, this loss serves a generally valid purpose. The purpose is protecting people from fraud when they're dealing with people who buy and sell property, a large-scale real estate transaction someone's biggest investment and that's an important, you know, it's a legitimate state interest in this law, you know. Even if it has an oppressive application to your client, this law generally is rational and related to a legitimate purpose.

And we appealed because one, that's not quite how the test works in Pennsylvania for this kind of constitutional challenge and two, the court seemed to fail to recognize that we were bringing an as-

applied challenge. They sort of conducted a facial analysis of our constitutional claim. So, we would have the Pennsylvania Supreme Court and the court reversed the grant of the demurrer.

So, we're now past the pleading stage and we're in the midst of discovery, but what makes the Pennsylvania Supreme Court's decision so remarkable is that it recognized, Look, we're deciding a question of first impression, and we're going to re-embrace our heightened rational basis test, our more engaged, rational basis test for challenges to occupational licensing laws like this one. And we can talk, we can unpack that a bit, but you know, one thing that's, what's really wonderful about the opinion is that listeners to *Short Circuit* might, might've heard folks talk about the *Patel* case before. The Texas Supreme court's decision in 2015 striking down an oppressive application of a cosmetology license to eyebrow threaders under that state's, that state's constitution. And the Pennsylvania Supreme Court expressly followed *Patel* and said, look, we're going to, like the Texas Supreme court, we apply a more engaged test under our state constitution. One that considers not just rational relationship, but what the court calls are real and substantial relationship between the law and its purported end and considers whether the law has an unduly oppressive application to the challenger. And those two parts of the test were, were crucial to the court's analysis and decision to reverse the Commonwealth Court.

ADAM: What really struck me as fascinating about this case in general, and then just the Supreme Court decision here, was again, they looked at their own constitution, which doesn't seem like it should be that big of a deal, but it is in state court litigation. People frequently forget that their own state constitutions protect their individual rights and state courts generally just look to the Federal Constitution. Look at kind of analogous provisions in the Federal Constitution and the amendments and follow what the federal courts have done. But Pennsylvania here said, no, we have our own constitution and we have our own, in Pennsylvania, they call it a Declaration of Rights. And what's really fascinating about the Pennsylvania case, is there their constitutional history actually predates the US's constitutional history. The Pennsylvania's first constitution was adopted after the US adopted their constitution or before the US adopted their constitution. And it, it quickly adopted, you know, subsequent versions, but a lot of their declaration of rights weight remains the exact same as it was before the US Constitution.

And the other interesting thing just about kind of state constitution in general, which Pennsylvania highlights is that under the US Constitution, the Bill of Rights and the Amendments protecting individual rights were almost an afterthought. They were a compromise between, I mean, the Federalists and people that were a little bit more wary of a federal constitution and kind of giving all these new powers to a federal government. But in Pennsylvania and other states, the declaration of rights is central to their constitution, to their constitutional process. The Declaration of Rights is first in the Pennsylvania Constitution, it makes up Article I. It is the very first thing you read when you read the Pennsylvania Constitution, as opposed to the US Constitution, where it's you have all the different powers of government, the structure of government, and then you get to the Bill of Rights afterwards.

ANTHONY [10:34]: Josh, what's the current lay of the land on different states having, you know, an explicitly more protective, rational basis test. I mean, we've litigated at IJ that the case in Texas you

talked about. Pennsylvania has clarified that, yeah, we really do have a higher rational basis test. Where, where else are there bright spots and not so bright spots?

JOSH: Well, I think there's a potential for bright spots, certainly in States with older constitutions and also in some Midwestern States. Those are the kinds of ones that, so I, I can tell you that North Carolina has some cases indicating that the state constitution's substantive due process analysis there it's Law of the Land Clause is more engaged than the federal constitution test. North Carolina also has some interesting constitutional provisions, like a Fruits of your Labor Clause, that actually trigger strict scrutiny for the right to earn a living, which is, which is really fascinating. It's a new development in state constitutional law down in North Carolina, really worth following.

I would say states kind of be disappointed about, but not necessarily to, to fully abandon, you know, in, in our effort to kind of continue to get states to engage with their constitutions are unfortunately, Maryland, which does have an older constitution, which does have a Law of Land Clause, just like North Carolina recently decided to forsake a lot of its older case law, applying a Real and Substantial Test.

In the seventies, the Maryland Court of Appeals, which is the Maryland High Court, actually said expressly recognized that their test is identical to Pennsylvania's test and Pennsylvania has applied this to part real and substantial and unduly oppressive test for almost 90 years. At one point, Maryland said we follow that test and it has since, since gone back on that. And the case IJ actually litigated *Pizza di Joey* which was a challenge to the City of Baltimore's 300-foot rule. The 300-foot rule basically said a food truck cannot sell the same kind of food as a restaurant within 300 feet of that restaurant in the city. And the high court recently just said, look, we apply the rational basis test, we don't apply real and substantial review. And this law satisfies that deferential standard.

So, you've got States, interestingly actually, in the Maryland high court, the court dropped a footnote expressly distinguishing the *Ladd* case. It was decided a few months after *Ladd* and said, look, we're the dissent noted that *Ladd* seems to follow the *Lochner* mold, and we're choosing not to, not to go down that, that sordid path.

ANTHONY: Sector of *Lochner*.

JOSH: Exactly. So, so there is a division on that's kind of burgeoning between different States. One more thing to note, New Hampshire, I was looking at this yesterday actually, in 2006, clarified that their real and substantial jurisprudence no longer controls under the state constitution is kind of substantive due process analysis. They just follow the federal rational basis test now as well. So, you know, States are kind of dividing on this. More so recently, I think, given that institutions like IJ are putting this issue directly before the courts and asking them to pick and choose. We did that, we did that in Texas. We did it in Pennsylvania. We did it in Maryland, and sometimes they choose wrong and sometimes they choose right. But I would say this, you know, it's a positive trend, right? Like you have states talking about their own constitutions having to decide these questions. And that's a, that's a really good thing.

ANTHONY: And one, one extreme example of that is, is I think probably the worst of all, is the Washington Supreme Court. Which in opinion, a about a year ago, I think that the Pacific Legal litigated, they expressly overruled pages and pages of state constitutional law cases that had applied something different than the, the, the extreme federal rational basis test, and said we we're, we're washing our hands of those kinds of individual rights protections.

JOSH: I mean, they attached an appendix that basically just said everything in this appendix goes away.

ADAM: I don't think I've seen a state Supreme court attach just like a multiple page appendix of like, here's all these cases that are no longer good law.

ANTHONY: But a place where, where prior precedent and the actual text of the Constitution still matters, of course is Pennsylvania. And so, Adam's going to talk about a couple other examples of what the Pennsylvania Supreme Court's been doing recently. Adam, what, what have you been reading?

ADAM [15:28]: Thanks, Anthony. So, a recent case, it's quite interesting, it's going to have, you know, potential huge effects for the, this upcoming election, is an election law case out of Pennsylvania there're a few Democrats in the state that challenged, a provision, a 2019 provision, which allowed for wider use of mail in ballot. So, in Pennsylvania beforehand, to get a mail in ballot, you had to prove that you were going to be absent from the state or the district. On election day, the 2019 law allowed for mail in ballots, whether you wouldn't be absent or not, you didn't have to prove that anymore, which, you know, turned out to be quite prescient cause the law was passed in October 2019 before, before the COVID, COVID-19 pandemics. So, it actually is quite helpful.

But with the, with the issues with the democratic primary there back in June, there were some issues and some questions about whether, whether or not the US postal service would be able to deliver the ballot to citizens in time for citizens to be able to return their ballots by 8:00 PM on election day. So there, the court looked at a bunch of different evidence about the, what, what the postal, the general master of the post service had said. And they determined that because of the deadline of when people had to apply for a mail in ballot, and by the time they might get the, the mail in ballot might only be the day before the election, which would not then reasonably give them time to get, to mail their ballot back to the election headquarters, wherever their ballot was going by 8:00 PM on election night, which is when, under the law, all they, all the ballots had to be received by.

So, the Pennsylvania Supreme Court kind of split the baby, the petitioners were asking for that deadline to be extended a week out, which was the deadline for the overseas ballots, but the Pennsylvania Supreme Court determined that that as long as it was received, as long as the ballots are received within three days of the election and they're not, and there's no evidence that they were postmarked after 8:00 PM on Election Day, those ballots would count. So, this case is now there's a stay pending before the US Supreme Court. Justice Alito requested a response by, from, from the Democrats at the state by October 5th. So now we're just kind of waiting to see what, what the Supreme court's going to do--if that

process is going to remain in place or whether you'll have to, in Pennsylvania, return, make sure your ballots are returned to election headquarters by 8:00 PM on Election Day.

But then there's a much more interesting case about the Pennsylvania State constitution from this past July dealing with a COVID restrictions, but not, it's not an individual rights challenge like many COVID-related restrictions have been. This case actually pitched the Republican General Assembly against the Democrat governor over the Democrat governor's emergency declarations relating to the COVID-19 pandemic. So, under the Pennsylvania emergency code statute, the governor can declare an emergency for up to 90 days, which gives him a whole host of other powers, which allows kind of money to, to move around and which allows kind of the suspension of certain restrictions. It was under this power that the governor actually closed a bunch of different businesses that were not considered to be life sustaining. A few of you might actually remember that we talked about that case *Friends of Danny DeVito* on a previous *Short Circuit* episode,

ANTHONY: A different Danny DeVito.

ADAM [18:50]: Right, not the Danny DeVito that you're thinking of most likely. And the Supreme Court actually just rejected cert in that case, this past Monday. So, it gives the governor a wide amount of powers, uh, but it caps the emergency declaration at 90 days, unless it's renewed by the governor. So, the governor issued his original emergency declaration; he then renewed it. A couple of days after he renewed it, the general assembly passed a concurrent resolution to terminate his emergency order. So, the statute that gives the governor the power also states I'm going to quote here because of the language here is actually very important that "the General Assembly by concurrent resolution may terminate a state of disaster emergency at any time there upon the governor shall issue an executive order, a proclamation ending the state disaster emergency." So, the general assembly passed this concurrent resolution, but the governor said he wasn't going to follow it. So, they filed a lawsuit. It, it went, it started in the Pennsylvania Supreme Court with their King's Bench jurisdiction, which allows them to kind of take over a case from the very beginning. And the governor was arguing that this statute and this clause actually ran against Article III, Section 8 of the Pennsylvania Constitution, which is their Presentment Clause, which requires every order, resolution, or vote to wish the concurrence of both houses maybe necessary, except on questions of adjournment, be presented to the governor for signature or veto. And then the general assembly can override that veto if they have the votes.

So, the question really comes down to does the Presentment Clause in the Pennsylvania Constitution restrict how the statute is supposed to operate? The majority here in this case decided to employ what is known as the canon of constitutional avoidance and interpret the statute to not require presentment or, or to require a presentment.

It said that if the, if the general assembly had envisioned a case or envisioned a situation where presentment would not be required, they wouldn't have put any burden on the government, on the governor to then issue an executive order proclamation ending the state of disaster. I think that's a bit of a kind of tenuous reasoning there too, to interpret the statute to say, well, presentment, isn't it foreclosed under the statute and so they interpreted the statute in a way to require presentment, to

avoid deciding the constitutional issue at question, which is whether the statute violated the Presentment Clause.

The court also looked to the Pennsylvania Declaration of Rights in this case, Article I, Section 12, which says that “no power of suspending law shall be exercised unless by the legislature or by its authority, the legislature.” The legislature argued that, argued that because of this protection that they had the power to act unilaterally without presentment to end the emergency order, because that's part of the emergency order allows the governor to suspend laws allows the executive agencies to expand law, to suspend the operations of laws. The court, again, rejected this statement here again, or rejected this argument saying that there was no actual affirmative power given to the legislature by this. What's interesting here, which I think is kind of more of the way court should look at this, was in the concurrence in dissent by Justice Dougherty, which actually brings up some very interesting questions that will be before the Supreme Court, the US Supreme Court this year regarding severability.

So there, Justice Dougherty argued that there is no other way to read the statute then to not require it presentment that the statute doesn't require presentment at all. So, since the statute doesn't require presentment, and the, since this is an essential legislative activity, that provision of the statute is unconstitutional. Which then gets us into the question of whether or not that provision of the statute is severable from the rest of the statute. Because it is such an important safeguard and allows the legislature to kind of manage emergency situations in a way, they wouldn't otherwise be able to, he said that the legislature, that it's not severable, that the whole statute, the whole emergency management statute should fall as unconstitutional.

JOSH: This is a, this is an interesting case for us for a number of reasons, Adam, and you covered a lot of them and kind of a shotgun approach, which I appreciate because there's a lot being addressed in this case.

One thing I found fascinating since we were just talking about *Ladd* was, I don't know if I mentioned this, but the dissenting justice in *Ladd* was Justice Wecht. And Justice Wecht was the one who wrote the majority opinion in this case. And it's kind of interesting to see. I mean, the threads in his decisions are very, very consistent. So, in the dissent in *Ladd*, he accused the majority of, of basically legislating of saying, look, you're considering whether this law is rational, arbitrary, oppressive--these are things that the legislature, as a political branch typically weighs when it's making policy. And so that's what the majority is doing here, it's, it's creating policy, it's legislating. In his majority opinion in this case, Adam, he starts and ends his opinion by making very, very clear what the court was not doing and how narrow the questions in the case actually were. He starts by assuring everybody, look, this is a dispute between the political branches about an issue of policy that reasonable people can disagree about and the people have strong opinions on, and we're not taking a position on any of that. We don't, we don't weigh rationality, we don't weigh oppressiveness. We don't do any of that. This is just a question of whether the law is constitutional or not. And the Constitution has nothing to do with those concepts.

And then he ends his opinion by saying, look, we've decided these narrow questions. We understand this is a politically charged issue. We don't weigh into policy; we don't weigh into politics. You know, we're just kind of, we're on the straight and narrow in our analysis of these things. It's just interesting how he frames that because, you know, you mentioned the *Danny DeVito* case. In the majority there, I

think it was Justice Donohue who wrote that opinion, she said, look, part of what we're going to analyze here and whether this isn't a proper exercise of police power, this executive order, is oppressiveness. We're actually going to go through this analysis, and he joined that opinion. So, I'm kind of interested in whether these two opinions, *DeVito* and this one, can actually be reconciled on some of these points. Not maybe dicta, honestly, I think it's kind of unnecessary for Justice Wecht to be making these introductory and concluding statements about deference and the limited role of the court to reach the merits of these questions. But I find it fascinating that he, he maintains a level of consistency, he does. I mean, you have to have to give that to them.

ADAM [25:30]: Yeah, you definitely do it. I think, you know, this opinion is super fascinating. I think that, the concurring dissenting opinions kind of get more to the point of, it seems like the majority is trying to find a way around the constitutional issue and they say, they're trying to find a way around the constitutional issue and they almost rewrite the statute to do that. There's nothing in the, in the statute to require presentment. They, they kind of base their whole argument on, well, the statute requires the governor to do something, so it must be that it must then be presented to him, but it's, it seems very tenuous that connection, the connection between requiring the governor to issue an executive order declaring an emergency over while giving the governor the power to veto that concurrent resolution.

As one of the, one of the amici pointed out, kind of the Court's decision here gives the governor kind of unchecked power. He can continue to extend this emergency as long as he wants to. And the general assembly can't do anything about it unless they have a veto-proof majority to override it. And what's, what's actually interesting is it technically, it takes less votes to impeach the governor than it does to override the governor's veto. So, the guy, it's an interesting situation where the governor can continue extending this emergency plan until they have enough to, until the general assembly has enough to override his veto. But once they have enough to override his veto, they could simply just impeach him for, if, if they think he's abusing he's abusing the emergency power. So, it's like a very interesting situation here.

ANTHONY: What majority do they need to impeach him by the way?

ADAM: Well, I think it's, I think it's two thirds in the Senate and then just a majority in the house. So, it's, it becomes like a very interesting question as far as like, well, you know, at what point does, does the emergency power in the continual extension of 90-day emergencies become too politically tenuous, I guess, for the, for the general assembly. So, I mean that, that delves into very political questions versus the constitutional questions.

I think the constitutional questions are just much more interesting cause you have just like this present moment language that very clearly says, you know, bill should be presented, and I think that the statute clearly envisions that it's shouldn't be presented.

ANTHONY: Well, one thing, one thing I thought was telling is although they, they do, you know make it the constitutional avoidance statutory construction case, they do pretty much outright come and say that a legislative veto, which is pretty much what this, what the statute visions, would be unconstitutional. And they rely on a case many listeners probably remember from law school, *Chadha* about a legislative veto that the Congress used to have in, regarding some immigration matters and that actually had, was using a lot of statutes and still Chadha, the US Supreme Court said, no, you can't, you can't do legislative vetoes. It has to be, it has to be presented.

Although I think, I think a good thing that Pennsylvania Supreme Court did here was they relied on, though they looked to Chadha, they also relied on the text and history of the Pennsylvania Constitution in a big way. Which by the way, they'll segue here, but the Michigan Supreme Court had a big case last week that many of you might've heard about, about the non-delegation doctrine in Michigan and found that the governor's orders there were unconstitutional under the Michigan Constitution. And they received some criticism because they relied on mostly on US Supreme Court decisions, not, you know, Michigan law and the structure of the Michigan Constitution, which I think was last adopted in 1963 or 62. And so, what's interesting here is, you know, Pennsylvania really, the Pennsylvania Supreme Court really took its time looking into its own case, law and history.

But it's, it came out at the same way the US Supreme Court came, Supreme Court has come out in the *Chadha* case and said, you know, although it's still just statutory interpretation, a legislative veto is unconstitutional. It says one line to the opinion, a legislative veto in the context of a statute declaring an emergency powers might, would be a good idea, it might be a bad idea, but it's not constitutional idea under the current charter which kind of gives the writing on the wall, right, for if that was true in other contexts.

ADAM: Right, and I think kind of going back to the structure of the decision, like you pointed out, the Pennsylvania relied, Pennsylvania Supreme Court relied on kind of Pennsylvania cases. They studied a lot of Pennsylvania cases and they actually relied on other state constitutions. So, in their decision, like they quote from, I think the Kentucky Constitution and the Louisiana Constitution and quote, analogous provisions from there. And they're really, they really seem like they're trying to figure out what the Pennsylvania Constitution says and how the Pennsylvania Constitution directs them to, to approach the situation and resolve the situation. Which is very different again, from like the Michigan decision, which focused very much on, on federal law.

JOSH [30:47]: You have to wonder, I mean, I certainly wonder this when I was reading through these cases and, and I, you know, I'm aware of the Michigan case too. And I wonder whether the different results in these cases is a function of when they came down the pipeline and the COVID crisis. Because, I mean, if you think about this case, the *Scarnati*, is that how you say it?

ADAM: I think so.

JOSH: Yeah. If you think about this case, I mean, it comes on the heels of the, the *Danny DeVito* case where the court issued very broad statements about, the deference paid to the governor in time of crisis, the broad powers delegated by the Emergency Act. You know, the, the broad basically how this is addressing a pandemic and a crisis, like this is the sine qua non of the police power, right?

Like these are just, how do you follow up a decision like that? By paring back any of that, you know, it seems like it's just to proximate to what they just said. And so, they cite *Danny DeVito* a lot in this case to kind of justify various aspects of the opinion. And so to me, I mean, it seems at least plausible that if the Pennsylvania Supreme Court hadn't decided one of the very first cases involving COVID to state Supreme Court level and come out the way it did as deferential as it did, we might be talking about a different decision here.

That may help to explain a little bit how courts are, I mean, the courts that have addressed this a bit later have gone, have taken a bit more of a skeptical stance of some of these executive orders that may be getting stale, right, or that may at some point warrant a bit more skepticism than initially during the kind of outbreak of the pandemic.

ADAM: So, I definitely think timing has a lot to do with this case here. This case came down in July, just, you know, a little more than a month after the second or after the first renewal of the governor's emergency declaration. So, this is like only the second 90-day period during the time the court was deciding in this case, you know, when you think back to July so much, so much was still unknown and so much still is unknown. So, it's very understandable why the majority would be hesitant to, to come to a conclusion. I think that the concurring dissenting opinion had the best kind of conclusion that the statute violates the presentment language and therefore has to be, or it's not severable because the, the present moment issue or that the concurring resolution that allowed the general assembly to terminate the emergency was so important to the statute that the whole statute would have to fall.

I think the majority was very worried about canceling and the, the entire Pennsylvania emergency code in the middle of the pandemic, especially with the election coming up, with flu season coming up, with so much unknown. It's very understandable why they'd be very wary and want to like really make sure that they exhausted all other options before striking down such an important, important law.

ANTHONY: I think we'll close on something I warned Adam about that will be totally non-controversial and not relevant to what's going on in the country right now. And that's that, that given what the Pennsylvania Supreme Court has at least hinted, as I was talking about, about the legislative veto that you need presentment under the Pennsylvania Constitution, at least, there is this clause in Article II, Section I of the US Constitution that we forget about sometimes. So, it says, "each state shall appoint in such manner as the legislature thereof may direct a number of electors." And then it goes on about electors. Now this, of course, the language about the elect, electoral college and although the electoral college was reformed formed with the 12th Amendment, as many of you learned at high school civics, this language still trolls for how the states do their electors. And of course, every state has elected by the people, their electors or long time, but there still remains this question of what could the legislature just appoint electors? And some of you may remember some our are, of our younger listeners may not,

but some of you may remember in the 2000 *Bush v. Gore* case and the, the litigation there and the recounts in Florida and all of that, there was this move by the Florida legislature too, because the litigation and recount was taking so long to just go ahead and appoint George w Bush's electors as the electors for Florida as the legislature. And that was in accordance also with some old federal legislation, but it was primarily under this, this clause and I think the concurrence by Justice Rehnquist, Chief Justice Rehnquist in *Bush v. Gore* also talked about this clause and how it says legislature and it doesn't say governor and legislature, it doesn't say state. It says legislature. Well, the Pennsylvania Supreme Court is now talked about legislature, of course, with its own constitution, but we have heard these reports and I've heard they were overplayed. And this was just, you know, thinking if we had another *Bush v. Gore* and a really close election, but there's this specter out there about, you know, what, if the legislature tried to do something really evil, even if it's state went for one candidate, if it was that nevertheless is select the slate for the other, because it is the legislature after all. And the question arises if that was in a state with a legislature, the legislature, one party, but the governor in another, could the governor veto that or is it entirely in the legislature's discretion? And the, of course this is, you know, the, the Supremacy Clause of the Constitution may apply here over the, the state constitution. So, Adam, I don't want you to take a stand on who would win in that, neither does anyone on this podcast, but what are your thoughts about like, how that, how you would even think through how that would work?

ADAM [36:34]: Right. So, I, I definitely, it's, it's a fascinating question, and I think it all comes, comes down to whether or not the appointment of electors would be considered legislation.

So, part of the decision was huge discussion about whether or not what, what the general assembly did in this case was actually legislating because it, presentment is only required when there is some sort of like legislative action or when it binds the state or commits the state to some sort of a position.

So, for example, you know, the spending of money or the creating of different departments requires presentment. But there's an explicit, there's an explicitness in the text that says it does need presentment for questions of internment. And when the founders of the Pennsylvania Constitution were, you know, writing this provision, it was all about kind of core legislative purposes.

So, the question really comes down to whether or not the pointing of the appointing of electors would be a legislative act or whether or, or not. So, there there's that question there as far as kind of like the interpretive question.

And then there's the other kind of interesting question of who actually decides this case? Is it the Pennsylvania Supreme court and their interpretation of the Pennsylvania Constitution? Does the Supreme, just the US Supreme Court have to interpret the Pennsylvania Constitution and what the presentment language in the, the Pennsylvania Constitution means in light of the US constitution's requirements for the appointing of electors and the Supremacy Clause.

So, there's a whole host of like very interesting questions, but it really will come down to whether the appointing of electors is, was considered as part of the legislative question by the founders of, and the drafters of the Pennsylvania Constitution. An interesting wrinkle that's kind of thrown in with this is that this language, independent of any constitution, the presentment language is largely unchanged from the, from its second constitution, which was adopted in 1790. The second Pennsylvania Constitution was

adopted in Philadelphia. There was another big constitutional convention in Philadelphia, just a couple of years earlier. So there there's a lot of interplay between what, what the, you know, the US constitutional, Constitution's presentment requirement is, and how that's interpreted with the Pennsylvania Constitution's Presentment Clause because they were adopted almost at the same time, in a very, in the exactly same location really.

JOSH: This is, so, it's interesting that your, you gave that answer at him because my first thought was based on the last thing Anthony said was that it might raise a Supremacy Clause issue. And so, my thought was that that would be kind of the dispositive question. So, I'm curious why you chose to perform kind of that, that breakdown based on like, is it a legislative act?

ADAM: Well, I think it's, you know, it's, I think the Supremacy Clause is probably going to be the deciding question as far as like, what, what can happen? I think the Supremacy Clause will be important for who gets the assigned the case--whether it's the US Supreme Court or the Pennsylvania Supreme Court. But I think it still has an interplay with the Pennsylvania Constitution. Cause the Pennsylvania Supreme Court can just decide that there doesn't need it, there doesn't need to be presentment. If there doesn't need to be presentments, then there's really is no conflict potentially with, with the US Constitution.

But kind of like Anthony was pointing out what makes this so interesting as you have, you know, a split of the governor and the legislature party-wise.

ANTHONY [40:05]: I, and I see, you know, there's the, there's an argument here that Article I, uh, Article II, Section I of the US Constitution, perhaps gives a power to the legislature of whatever, of every state that perhaps the state constitution or state laws doesn't give to that legislature. And you know, what does that even mean? Or do you have to go through the law of the state to figure out what quote legislature means in Article II, Section I. Like, does it incorporate the state law as to what legislature means and that you need, you can't have legislative vetoes or whatever, or, or is it just this independent power that, because it is a legislature of a state it wields without its own state laws, which is hopefully a question we will never, ever have to answer in the United State, let alone in the state of Pennsylvania. But there are many questions about state constitutional law, Pennsylvania law that will be answered at our forum, next week, Friday, October 16th, please join us again.

You can find us online in various ways--we'll put a link up on the feed to this podcast. You can also go to the Federalist Society's page for their events because we are co-sponsoring with the Philadelphia chapter of the Federalist Society. Anything you ever wanted to know about the Pennsylvania constitution, other than the question we just talked about, will be answered at this event. It will be a way for you to get engaged with the Constitution.

So, for everyone, thank you for joining us today. We'll see you next Friday, October 16th with the Pennsylvania state forum. Thanks, everybody.